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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 JONATHAN W. McKINNEY,

10 Plaintiff,

11 v.

12 C/O JOHN MILLS,

13 Defendant.

Case No. C08-5720BHS

ORDER DENYING REPORT AND
RECOMMENDATION AND
REFERRING MATTER BACK TO
MAGISTRATE JUDGE FOR
FURTHER REVIEW

14 This matter comes before the Court on the Report and Recommendation of the
15 Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 26), and Plaintiff's
16 objections to the Report and Recommendation (Dkt. 27).

17 The November 16, 2009, Report and Recommendation ("R&R") recommends
18 dismissing Plaintiff's complaint without prejudice because Plaintiff failed to exhaust the
19 prison's grievance process before filing his federal complaint. Dkt. 26. Specifically, the
20 R&R recognizes that Plaintiff arguably began some sort of process by filing a handwritten
21 complaint but that Plaintiff did not complete the administrative appeal process before
22 coming before this Court. Dkt. 26 at 7.¹

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25 ¹The R&R takes the position that, since Plaintiff's handwritten statement resulted in a
26 department investigation and written reprimand of Defendant, Plaintiff arguably began but did not
27 exhaust the grievance process. Dkt. 26 at 7. This position is at odds with the Defendant's position,
28 which is that Plaintiff never even began the grievance process because he failed to request and then
submit a grievance form, the first step(s) in the process. *See* Dkt. 13 at 4-5.


1 On December 2, 2009, Plaintiff timely objected to the R&R (Dkt. 27) and also filed a
2 proposed second amended complaint (Dkt. 28). Plaintiff's second amended complaint
3 alleges facts that, if true, could establish that Plaintiff's attempts to engage in the prison's
4 grievance process were thwarted by the prison staff. Defendant did not respond to Plaintiff's
5 objections to the R&R.

6 It appears that more facts are needed before this matter can be resolved. It is unclear
7 whether Plaintiff began the grievance process through the submission of a handwritten
8 statement. It is unclear whether or not Plaintiff was prevented by the prison staff from
9 exhausting his remedies. Therefore, the Court concludes that Plaintiff's complaint cannot be
10 dismissed prior to evaluating what effect, if any, the proposed amended complaint has on his
11 case.

12 The Court having considered the Report and Recommendation, Plaintiff's objections,
13 and the remaining record, does hereby find and order:

- 14 (1) The Court **DENIES** the Report and Recommendation; and
15 (2) This action is **REFERRED** back to the Magistrate Judge for further review as
16 discussed herein.

17 DATED this 25th day of January, 2010.

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20 BENJAMIN H. SETTLE
21 United States District Judge
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